In the Supreme Court of the United States

~~76-~~1221

IN RE: GRAND JURY PROCEEDINGS

ANTHONY R. FIELD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COMES NOW ANTHONY R. FIELD, by and through his undersigned attorneys, and files this Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit seeking review of the decision of that Court entered in this case on June 28, 1976.

OPINIONS BELOW

The order of the District Court is unreported and is reproduced in Appendix A hereto, *infra*, App. 1 & 2. The opinion of the Circuit Court of Appeals is presently unreported and is reproduced in Appendix A hereto, *infra*, App. 3-15.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit in this case was filed May 13, 1976. The Petition of Anthony R. Field for rehearing was denied by Order entered June 28, 1976.

This Court has jurisdiction pursuant to 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

I. WHETHER THE FIFTH AMENDMENT'S PROTECTION AGAINST DEPRIVATION OF LIBERTY WITHOUT DUE PROCESS OF LAW ENCOMPASSES PROTECTION OF AN INDIVIDUAL AGAINST JUDICIAL COMPULSION TO COMMIT A CRIMINAL ACT.

II. WHETHER THE FIFTH AMENDMENT'S PRIVILEGE AGAINST SELF-INCRIMINATION ENCOMPASSES A PRIVILEGE OF AN ALIEN AGAINST BEING COMPELLED TO TESTIFY BEFORE A GRAND JURY WHERE THAT TESTIMONY WILL SUBJECT HIM TO A REAL AND SUBSTANTIAL RISK OF PROSECUTION IN THE FOREIGN COUNTRY OF HIS RESIDENCE.

III. WHETHER THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT WITH RESPECT TO THE APPLICATION OF PRINCIPLES OF INTERNATIONAL COMITY TO COMPEL TESTIMONY FROM A FOREIGN NATIONAL IN VIOLATION OF THE CRIMINAL LAWS OF HIS COUNTRY OF RESIDENCE.

IV. WHETHER A SUBPOENA DIRECTED TO A WITNESS IN A FOREIGN COUNTRY ISSUED BY A DISTRICT COURT CLERK WITHOUT PRIOR JUDICIAL REVIEW, AND NOT SERVED IN ACCORDANCE WITH RULE 17(e)(2), F.R.Cr.P. CONFERS JURISDICTION OF AN ALIEN NONRESIDENT ON A DISTRICT COURT.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions involved are the Due Process and self-incrimination clauses of the Fifth Amendment to the United States Constitution. The statute under which the witness was cited for contempt is 28 U.S.C. §1826. The rule and statute governing issuance of the subpoena are Rule 17, Federal Rules of Criminal Procedure and 28 U.S.C. §1783. These provisions, together with the Banks and Trust Companies Regulation Law, 1966 (Cayman Islands), are reproduced in Appendix B.

Case Authorities

Application of Chase Manhattan Bank, 297 F.2d 611 (2d. Cir. 1962).

Blau v. United States, 340 U.S. 159 (1950).

Environmental Protection Agency v. Mink, 410 U.S. 73 (1973).

First National City Bank v. IRS, 271 F.2d 616 (2d. Cir. 1959), *cert. den.*, 361 U.S. 948 (1960).

Fuentes v. Shevin, 407 U.S. 67 (1972).

United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968).

United States v. Reynolds, 345 U.S. 1 (1953).

Zicarelli v. New Jersey Investigation Commission, 406 U. S. 472 (1972).

Constitutions & Statutes

U.S. Constitution, Amendment V

5 U.S.C. §552(b)(1)

18 U.S.C. §6002

18 U.S.C. §6003

28 U.S.C. §1783

28 U.S.C. §1826

Rules

Rule 17, Federal Rules of Criminal Procedure

Rule 17, Federal Rules of Criminal Procedure

Other

Banks and Trust Companies Regulation Law, 1966 (Cayman Islands)

STATEMENT OF THE CASE

This is a Petition for a Writ of Certiorari seeking review of the decision of the United States Circuit Court of Appeals for the Fifth Circuit affirming a contempt citation and order of confinement of Anthony R. Field, entered by Judge Peter T. Fay of the United States District Court for the Southern District of Florida, on March 18, 1976, pursuant to Title 28 USC §1826.

The Order was entered upon the continued refusal of Anthony R. Field to testify before Federal Grand Jury 76-1, impaneled and sitting in Miami, Florida, after having been granted immunity pursuant to 18 USC §6003.

The witness was served with a subpoena on January 12, 1976, in the lobby of Miami International Airport as he was preparing to return to the Cayman Islands after a weekend stay in Miami. He was not detained, left the country and returned to appear before the grand jury on January 20, 1976. Prior to his appearance his attorneys filed a motion to quash the subpoena. By agreement, hearing of that motion was continued. The witness went before the grand jury with the stipulation that none of the challenges raised by the motion were waived.

Mr. Field refused to answer questions relating to the affairs of Castle Bank & Trust Company (Cayman) Ltd. and its depositors because disclosure of that information would be a violation of the Banks and Trust Companies Regulation Law, 1966 (Cayman Islands) [hereinafter the Bank Secrecy Law], for which he would face a real and substantial risk of prosecution in the Cayman Islands, the country of his residence. Field has not refused to answer any questions which do not seek disclosure of privileged information and for which he has been granted immunity.

Field has at all times challenged the jurisdiction of the District Court; the validity of the subpoena; the constitutionality of the procedures, and the conformity of the procedures with applicable principles of international law.

At the show cause hearing Judge Fay found:

> There is, in fact, a reasonable probability that Mr. Field is going to be exposed to some criminal charges and some criminal punishment for violating the Cayman Bank Secrecy Act. . . .

Notwithstanding this finding, Judge Fay granted the government's motion to compel testimony and upon Field's continued refusal to testify cited him for civil contempt.

The appeal was duly prosecuted, and after briefing and oral argument, the United States Circuit Court of Appeals for the Fifth Circuit affirmed the District Judge.

Although the Circuit Court agreed with the District Court that Field would be subject to criminal prosecution in the Cayman Islands if he were compelled to testify before the grand jury, the court rejected his Fifth Amendment argument, holding that the protection sought in this case was outside the scope of the self-incrimination clause.

The court also rejected the argument that international comity principles required quashing the subpoena for the reason that the significant interest of the United States in tax enforcement out-weighed any interest of the Cayman Islands or of Field in this matter.

Finally, the Court rejected attacks on the issuance and service of the subpoena for the reason that Field did not suffer a grievous loss of liberty by virtue of the requirement that he appear before the grand jury and dismissed the contention that the subpoena was invalidly served as being without merit.

Mr. Field seeks review of this decision.

REASONS FOR GRANTING THE WRIT

I

The fundamental unfairness of a court decree compelling an individual to commit a criminal act so far departs from accepted judicial procedure as to call for an exercise of this Court's supervision. It does not matter that the act is made criminal by the law of the United States or by foreign laws. The courts of the United States have put Anthony Field in an unconscionable position where he faces imprisonment if he testifies and faces imprisonment if he does not testify. The wrong is made more egregious by the fact that both the District Court and the Court of Appeals in this case have conceded the unfortunate position in which they have put Mr. Field.

Nonetheless, the Court of Appeals has expressed the opinion that placing Field in such an untenable position is justified by this country's overwhelming interest in the enforcement of its tax laws. This decision denies two hundred years of judicial history that, even while recognizing the importance of enforcement of criminal laws, stands for the proposition that those laws will not be enforced at the expense of an individual's rights.

The Court of Appeals has relied on the paramount importance of grand jury investigations to he enforcement of the criminal laws and, specifically, the tax laws of the United States. But the courts of the United States have always recognized the fact that as important as a grand jury investigation may be, it may nonetheless be frustrated by the valid assertion by an individual of constitutional, statutory, and common law privileges.

Tony Field has a privilege not to disclose the information sought by the grand jury in this case. That privilege is conferred on him by the Bank Secrecy Law of the Cayman Islands. The government of the Cayman Islands is so concerned with the existence of this privilege that they have given it the teeth of criminal sanctions to punish violations.

There is no true analogue to such a privilege in the laws of the United States. Those privileges most commonly recognized — attorney/client, husband/wife, priest/penitent — carry no criminal sanctions for the breach. The closest any of them come is the possible disciplinary action faced by an attorney for breach of a client's confidence.

Yet, even in the absence of criminal sanctions, the valid assertion of these privileges has been upheld as a defense to a contempt citation. As recently as its decision in *United States v. Nixon*, 418 U.S. 683 (1974) this Court has stated that if the privilege is found to be invoked properly the testimony sought may not be compelled from the witness, even before a grand jury.

There is no rational basis for distinguishing between a common law privilege, a privilege conferred by laws of the United States and a privilege conferred by foreign law. That is especially true where, as here, the foreign privilege carries criminal sanctions for its violation. Any distinction between American and Caymanian imprisonment is lost on Mr. Field.

In the normal situation United States courts can review the privilege, determine whether it exists, and secondly, whether it is properly invoked. If either of these

two factors is missing, the court will compel the testimony from the witness, not in violation of the privilege, but in the absence of the privilege.

The laws of the United States do provide one situation closely analogous to that of Mr. Field, where the disclosure of information, in and of itself, constitutes a criminal act. The laws of the United States make it a crime to disclose information relating to the national security and defense of the United States. The integrity of the secrecy of this information was preserved in an exception to the disclosure provisions of the Freedom of Information Act, 5 U.S.C. §552(b)(1).

There have been very few cases in which courts have been asked to compel disclosure of information classified in the national security interest. On those occasions, the courts of the United States refused to compel production of the information. Thus, in *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973) wherein members of Congress sought production of classified material under the Freedom of Information Act, the Supreme Court refused to allow even in camera inspection of documents classified top secret and secret.

Similarly, in *United States v. Reynolds*, 345 U.S. 1 (1953) this court refused to compel the production of the official accident report and other documents containing military secrets in an action against the government under the Federal Tort Claims Act for the death of civilians in a crash of a military plane.

Extending this analogy to a grand jury proceeding, it is difficult to imagine that a person called before a

grand jury to testify concerning national security information could be compelled to testify in violation of the laws of the United States.

The instant case concerns bank secrets and not military secrets. Nevertheless, testimony concerning those secrets is as much a criminal act for Tony Field as testimony concerning military secrets would be for a U.S. Official. To compel Mr. Field to commit a criminal act by testifying in this case is contrary to the fundamental principles of due process of law established by the Fifth Amendment. Moreover, denial of his right to assert a valid privilege on the sole basis of his alienage denies Mr. Field equal protection of the law, encompassed in the due process clause of the Fifth Amendment.

II

The decision of the Court of Appeals with respect to the applicability of the Fifth Amendment privilege against self-incrimination in this case presents an important question as to the scope of that privilege which has not been, but should be, settled by this Court.

Certainly, this is not a case where Mr. Field will be compelled to state: "Yes, I stole the car." On the other hand, Mr. Field is not being asked simply to recite nursery rhymes or particular words in order to determine the physical characteristics of his voice. The first example is clearly protected by the Fifth Amendment privilege against self-incrimination, while the second, voice exemplars, has been excluded from that protection.

The instant case presents a situation where the fact of testimony constitutes a criminal act under the laws of the Cayman Islands, but where the content of that testimony constitutes the evidence of the crime. Consequently, while the Court of Appeals in this case has rationalized the result of its decision by stating that the Fifth Amendment does not provide protection from the fact of testimony, it has overlooked the essential factor that the testimony which Mr. Field provides will itself be evidence which may be used against Mr. Field in any criminal prosecution undertaken by the Caymanian government.

This court in *Zicarelli v. New Jersey Investigation Commission*, 406 U.S. 472 (1972) recognized the fact that a real and substantial risk of prosecution by a foreign country by virtue of testimony given in the United States gives rise to a Fifth Amendment claim. It is our contention that this situation, which the court found lacking in the final analysis in *Zicarelli*, is now squarely presented.

Caymanian law does not proscribe any and all testimony by Mr. Field before the grand jury. It simply prohibits Mr. Field from testifying concerning the affairs of his bank and his bank's customers. For this reason, in order to prove that Mr. Field violated Caymanian law by his testimony, the Caymanian government must show the content of that testimony. Thus, while the content of the testimony of Mr. Field will not provide evidence incriminating him in any prior criminal acts, it will provide a link in the chain of evidence necessary to prosecute him for violation of the Bank Secrecy Law.

The right to assert the Fifth Amendment privilege to protect against testimony, the content of which will pro-

vide such an evidential link, was set out in *Blau v. United States*, 340 U.S. 159 (1950), and recognized in *Zicarelli*, *supra*.

Thus, in the present posture of the case, while it is the fact of testimony which constitutes a criminal act, the use of the contents of that testimony is necessary for prosecution. There can be no question but that the information sought by this grand jury from Mr. Field is testimonial and communicative in nature. They are not seeking a voice exemplar or asking that Mr. Field demonstrate any other physical characteristic. He is being asked to testify, under oath, concerning the affairs of Castle (Cayman) in violation of the laws of the Cayman Islands. In fact, he is being compelled to give testimony which may be used in evidence against him in criminal proceedings in the Cayman Islands.[1]

For these reasons, Mr. Field is entitled to invoke the protections of the Fifth Amendment by asserting the privilege conferred on him by it not to be a witness against himself in a criminal proceeding.

III

The decision of the Court of Appeals on the issue of international comity in the present case conflicts with decisions of the United States Circuit Court of Appeals for the Second Circuit in cases presenting substantially similar

[1]It has been suggested that the secrecy of grand jury proceedings protects Mr. Field. However, the District Court found that there was little secrecy in this particular proceeding. Because the Circuit Court found there was no privilege, it did not reach this question. If Mr. Field's Fifth Amendment claim is upheld, it may be appropriate to remand this case to the Fifth Circuit for consideration of the effect of grand jury secrecy on that privilege.

issues. The conflict should be resolved by this Court because the issue is one which is likely to recur and has in fact recurred on several occasions in the past.

In *Application of Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962) the issues and interests of the parties were substantially the same as they are in this case. That case, as this one, involved a grand jury tax investigation. Thus, the interest of the United States was there, as it is here, collection of revenue. Moreover, the witness in that case faced the imposition of criminal penalties in a foreign country if it complied with the subpoena. Mr. Field faces the same penalties if he complies with the subpoena in this case. Indeed, the only difference between the two cases is that here the subpoena is for testimony while in *Application of Chase Manhattan Bank*, the subpoena was duces tecum for bank records located in Panama. This difference is insignificant, for both cases involve simply the production of evidence by one means or another before an American Grand Jury investigating possible tax violation which production would violate the laws of a foreign sovereign. In *Application of Chase Manhattan* the Second Circuit upheld modification of a subpoena to avoid violation of foreign law, while in the present case the Fifth Circuit has enforced just such a subpoena.

The Second Circuit has consistently recognized possible criminal sanctions in a foreign nation as a grounds for modifying or vacating subpoenas. Thus, in *First National City Bank v. IRS*, 271 F.2d 616 (2d Cir. 1959), cert. denied, 361 U.S. 948 (1960), that court refused to modify a subpoena because it was not shown that compliance with the subpoena would involve violation of criminal laws of the foreign nation. A similar result was

reached in *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968), where the privilege invoked was not founded upon criminal liability in the foreign nation.

In fact, the government in *United States v. First National City Bank, supra* argued that to be excused from compliance with a federal court order a witness must demonstrate that compliance would cause him to suffer criminal liability in a foreign country. Tony Field has shown to the satisfaction of both the District Court and the Court of Appeals in this case that he will suffer criminal liability in a foreign country; the Government, however, has obviously altered its position from that taken in *United States v. First National City Bank, supra.*

The opinion of the Court of Appeals expressed concern that deference to the law of the Cayman Islands would significantly restrict the essential means that the grand jury has of evaluating whether to bring an indictment. While that may be true in some cases, it is not true in the present situation. The thrust of the Government's investigation surrounding Castle Bank & Trust (Cayman) Ltd. has been transactions of United States citizens with that bank and activities of that bank in the United States which might subject the bank itself to tax liability. The Government has alternative and readily available means of obtaining this information without infringing upon the sovereignty of the Cayman Islands or subjecting Tony Field to criminal liability in that country.

The Fifth Circuit in its opinion alluded to the fact that the information sought from Field could be compelled from American Banks. Castle (Cayman) though, is not an American institution. Also, the fact that Caymanian au-

thorities acting through proper channels in accordance with the banking laws of that country, could obtain the information (although they would then be subject to the Bank Secrecy Law) does not alter the fact that disclosure by Field other than in compliance with an order from the Caymanian court, constitutes a criminal act. This is the policy of the legislative body of the Cayman Islands expressed in its statutes.

IV

The approval of the manner of issuance and of service of the subpoena directed to Anthony Field by the Court of Appeals in this case so far departs from accepted judicial procedure as to call for an exercise of this Court's supervision.

The issuance of the subpoena in this case offends both statutory requirements and constitutional notions of due process. It is pious myth to characterize witness subpoenas such as the one involved in this case as "judicial process," for the common practice is for the clerk of the court to deliver to the U.S. Attorney blank forms, with the signature and seal previously affixed. All that remains is for the attorney at his own discretion and for his own purposes to fill in the blank subpoena and have it served on the individual.

This Court in *Fuentes v. Shevin*, 407 U.S. 67 (1972) struck down as unconstitutional the common state practice of the issuance of writs of replevin by court clerks upon the ex parte application of an attorney or other individual as violative of the due process clause of the Fifth Amendment. This Court in that opinion made clear that a subse-

quent hearing does not satisfy the due process requirement. The issuance of the subpoena in this case is not significantly different from the issuance of the writs in the *Fuentes* case.

Issuance of a subpoena is governed by Rule 17, Federal Rules of Criminal Procedure. That rule states that a subpoena directed to a witness in a foreign country may be served only in accordance with 28 U.S.C. §1783, and that statute allows service of process only on United States citizens or residents.

This subpoena was directed to a witness in a foreign country, as it showed on its face by the language "Tony Field, George Town, Cayman Island." There is no statutory authorization for a Federal Court to issue such a subpoena.

The fact that the subpoena was actually served within the United States is of little significance. Sanctioning this procedure would encourage federal officers to obtain subpoenas which they may not serve, and then to invade areas of expected privacy by wire tap, mail interception, or monitoring of ticketing information through the Civil Aeronautics Board computer, so that they may lie in wait, subpoena in hand, when there is a chance that the individual sought may enter this country for lawful purposes.

The challenge presented herein does not threaten the day-to-day operations of the judicial system. Summonses and subpoenas issued as a matter of course to United States citizens are not in issue. Obedience to such writ is a duty of citizenship of all those under the protection of the United States.

Mr. Field, however, owes no allegience to this country. He is a Canadian national who resides and works in the Cayman Islands. The subpoena shows on its face that Anthony Field is outside the jurisdiction of the courts of the United States. If the rules of criminal procedure and the related statutory provisions had been followed, Mr. Field would not now face imprisonment. Statutory requirements of the methods of service may not be disregarded because of expediency.

The abuse of process shown by the history of this case requires the intervention of this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted

JOSE E. MARTINEZ

CERTIFICATE

I hereby certify that a copy of the foregoing petition for certiorari has been furnished by mail this 27 day of July, 1976, to Robert A. Bork, Esq., Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and Bernard S. Bailor, Esq., Department of Justice, Tax Division, Criminal Section, Room 4607, Main Justice, Washington D.C. 20530.

JOSE E. MARTINEZ

APPENDIX A

OPINIONS BELOW

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 76-1

IN RE:
GRAND JURY PROCEEDINGS

ORDER

(Filed March 18, 1976)

THIS CAUSE is before the Court on the Motion of the United States of America to have Grand Jury witness Anthony R. Field held in contempt of this Court for refusing to answer questions of the Grand Jury after being granted immunity pursuant to Title 18, United States Code, Section 6003.

Upon consideration of the record in this cause, it is ORDERED and ADJUDGED that Grand Jury witness Anthony R. Field is in contempt of this Court for refusing to testify. The said witness is ordered committed to the custody of the United States Marshal until such time as he purges himself of contempt by testifying or the Grand Jury's term expires.

It is further ORDERED and ADJUDGED that the confinement shall be stayed pending appeal of this issue and the witness shall be released on $25,000 bond.

DONE and ORDERED at Miami, Florida, this 18th day of March, 1976.

PETER T. FAY

United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-1739

IN RE: GRAND JURY PROCEEDINGS

UNITED STATES OF AMERICA,

Appellee,

versus

ANTHONY R. FIELD,

Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(May 13, 1976)

Before TUTTLE, GEWIN, and MORGAN, Circuit Judges.
MORGAN, Circuit Judge:

This appeal presents the situation where an alien who was subpoenaed while present in the United States is required to testify before a grand jury even though the very act of testifying will probably subject him to criminal prosecution in his country of residence. The case arises as an appeal from the Southern District of Florida of an order of commitment for civil contempt for refusal to answer grand jury questions. Anthony R. Field contends that the requirement that he testify is a violation of his Fifth Amendment rights. Field, moreover, contends that he

should not be required to testify as a matter of comity between nations. Finally, he attacks the power of the government to issue the subpoena and the procedures used in issuing this particular subpoena. We find that requiring Field to testify violates neither the Constitution nor international comity and that the subpoena was properly issued. Therefore, we affirm the district court.

Presently, a grand jury in the Southern District of Florida is investigating possible criminal violations of tax laws. Part of this investigation centers on the use of foreign banks to evade tax enforcement. Field, a Canadian citizen, is the managing director of Castle Bank and Trust Company (Cayman), Ltd. which is located in Georgetown, Grand Cayman Island, British West Indies.[1] On January 12, 1976, Field, while in the lobby of the Miami International Airport, was served with a subpoena directing him to appear before the grand jury on January 20. During his testimony, Field was asked several questions concerning his activities on behalf of Castle and its clients. Field, however, refused to answer these questions on the ground that he would incriminate himself in violation of his Fifth Amendment rights and also on the ground that his testimony would violate the bank secrecy laws[2] of the Cayman Islands. On February 18, 1976, Field was granted immunity and ordered to resume his testimony. Field still refused to answer the questions.

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[1]The British West Indies is a Royal Crown Colony of the United Kingdom. The colony, however, appears to have a great deal of autonomy.

[2]Bank and Trust Companies Regulation Law, 1966 (Law 8) (Cayman Islands).

A hearing was held on Field's motion to quash and the government's motion to compel testimony on March 18, 1976. At that hearing, the government demonstrated that Castle Bank had engaged in activities within the United States including maintaining deposits in American banks and engaging in certain securities transactions. The government also demonstrated that another bank, Castle Bank and Trust Company (Bahamas), had extensive dealings in the United States in real estate. Pointing out that Castle (Cayman) and Castle (Bahamas) had several of the same officers and that apparently the two organizations had commingled funds, the government argued that much of the activity of Castle (Bahamas) should be imputed to Castle (Cayman). The government did not demonstrate that Field held any office in or was an employee of Castle (Bahamas). Nor did the government present any evidence concerning tax evasion or explain in detail what evidence it planned to present before the grand jury.

Besides characterizing Castle (Cayman) activities in the United States as minor, Field did not seriously challenge the government's evidence. On the other hand, Field argues that requiring his testimony before the grand jury concerning matters pertaining to Castle (Cayman) would violate the law of the Cayman Islands. He submitted an affidavit by an expert on Cayman law that stated that Field could be subject to criminal punishment for answering the questions before the grand jury. The affidavit, moreover, stated that the bank examiner of the Cayman Islands could require Field to state whether he had testified before the grand jury. If Field refused to answer the questions of the bank examiner, he was subject to a criminal penalty of up to six months imprisonment. The government did not contest that Field in testifying before the

grand jury would subject himself to criminal prosecution in the Cayman Islands, his place of employment and residence. After ordering Field to testify the district court stated,

> I think the record should show that this court finds that there is, in fact, a reasonable probability that Mr. Field is going to be exposed to some criminal charges and some criminal punishment for violating the Cayman Bank Secrecy Act.

Upon stipulation that Field would continue to refuse to answer the questions before the grand jury, the district court held him in civil contempt and Field appeals pursuant to 28 U.S.C. §1826(b).[3]

Before discussing in detail Field's contentions, we should make clear what is not involved in this case. Field does not argue that the content of his answers before the grand jury will subject him to prosecution in the Cayman Islands. The problem is not the answers that Field will give to the grand jury but the fact that he will give any answers at all. A different case would be presented if Field had demonstrated that the content of his answers could be used as evidence against him in foreign prosecutions.[4] See, In re Tierney, 465 F.2d 806 (5th Cir. 1972), cert. denied 410 US 914 (1973). In such a case, a difficult question concerning Fifth Amendment protection against

[3]Section 1826(b) provides that appeals will be decided in thirty days. In order to obtain full briefs and to provide for oral argument we extend the period of decision an extra thirty days to May 17, 1976. See Beverly v. United States, 468 F.2d 732 (5th Cir. 1972).

[4]At oral argument, Field's attorney stated that he did not anticipate that any answers Field might give to the grand jury will provide information concerning any violations of Cayman Law.

self-incrimination would be present. Zicarelli v. New Jersey Investigation Commission, 406 U.S. 472, 478 (1972).

Field does argue that the Fifth Amendment prohibition against compulsory self-incrimination encompasses his present situation. In essence, he contends that since the act of testifying subjects him to foreign prosecution, requiring his testimony would be compelling Field to be a witness against himself.

We believe Field has misconstrued the scope of the protection against self-incrimination. The Fifth Amendment, as the Supreme Court stated in Lefkowitz v. Turley, 414 U.S. 70 (1973) protects against only the use of testimony. There the Court stated,

> A witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. (Emphasis added.) Id. at 78.

As this passage indicates the fact of testifying is not protected by the Fifth Amendment. See also, Kastigar v. United States, 406 U.S. 441, 453 (1972). The consistent interpretation of the Amendment has been to insure that a person would not be required to give testimony that tended to show that the person had committed a crime. Counselman v. Hitchcock, 142 U.S. 547, 563 (1892). Historically, the privilege was adopted to restrain the state from submitting to the temptation of resorting to the expedient of compelling incriminating evidence from one's own mouth. Couch v. United States, 409 U.S. 322, 327

(1973). This subpoena is not an attempt to elicit information from Field which will later be used against him in a criminal case. The Fifth Amendment simply is not pertinent to the situation where a foreign state makes the act of testifying a criminal offense.

Field's second contention is that as a matter of international comity this court should refuse to enforce the subpoena. In this contention, Field requests that an appropriate accommodation between the law of the United States and that of the Cayman Islands is for this court, exercising its discretion, to decline enforcement. Field argues that nations should make every effort to avoid the situation present here, where one nation requires an act that the other nation makes illegal. See United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968); Restatement (2nd), Foreign Relations Law of the United States, §40 (1965).

We begin with the proposition that the fact that the district court's order will subject Field to criminal prosecution in his country of residence does not of itself prohibit enforcement of the subpoena. Restatement (2nd), Foreign Relations Law of the United States, §39 (1965). See also, American Industrial Contracting Inc. v. Johns-Manville Corp., 326 F.Supp. 879 (W.D. Pa. 1971). The Restatement[5] position requires a balancing of the several

[5]Section 40, Restatement (2nd) Foreign Relations Law of the United States, reads:

Limitations on Exercise of Enforcement Jurisdiction

Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as

factors in determining whether the United States or, in this case, the Cayman Islands' legal command will prevail.

The first and most important factor to be considered is the relative interest of the states involved. In this case, the United States seeks to obtain information concerning the violation of its tax laws. In contradistinction, the Cayman Islands seeks to protect the right of privacy that is incorporated into its bank secrecy laws. Unfortunately, the Cayman Government position appears to be that any testimony concerning the bank will violate its laws. Therefore, either the United States or the Cayman interest must give way.

Under our system of jurisprudence the grand jury's function in investigating possible criminal violations is vital. Recently, the Supreme Court has succinctly explained why undue restrictions on our criminal justice system's ability to obtain evidence would be unwarranted. The Court stated:

> The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and the public confidence in the system depends on full disclos-

(a) vital national interests of each of the states,

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

> ure of all facts within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense. United States v. Nixon, 418 U.S. 683, 709 (1974).

To the degree that the ability to obtain evidence is crucial to all criminal justice proceedings, the need for broad authority in the grand jury is greatest. The Supreme Court has stated "the grand jury's authority to subpoena witnesses is not only historic but essential to its task." Branzburg v. Hays, 408 U.S. 665, 668 (1973). Courts have repeatedly allowed the grand jury wide discretion in seeking evidence. See, United States v. Dionisio, 410 U.S. 1 (1973). Generally, the normal rules providing for the exclusion of evidence obtained by illegal means does not apply to the grand jury. See, United States v. Calandra, 414 U.S. 338 (1974); Costello v. United States, 350 U.S. 359 (1956). The Supreme Court, as well as this court, has rejected not insubstantial First Amendment claims which would have restricted the power of the grand jury to obtain the information. Branzburg v. Hays, supra; Beverly v. United States, 468 F.2d 732 (5th Cir. 1972). Even the President of the United States under proper circumstances can be required to produce evidence before the grand jury. Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973). Finally, courts have consistently rejected the contention that one may refuse to testify before grand juries due to fear of personal safety. See, e.g., United States v. Leyva, 513 F.2d 774, 780 (5th Cir. 1975); In re Long Vistor, 523 F.2d 443, 447-48 (8th Cir. 1975). To defer to the law of the Cayman Islands and refuse to require Mr.

Field to testify would significantly restrict the essential means that the grand jury has of evaluating whether to bring an indictment.

In addition to the necessity of the grand jury being able to obtain evidence, this country allows wide discretion to investigatory bodies in obtaining information concerning bank activities. United States v. Miller, 44 L.W. 4528, (Apr. 20, 1976). There could be no question that Mr. Field would be required to respond to the grand jury's questions if this was solely a domestic case. Nor is the United States alone in granting wide discretion to its investigators in obtaining information from financial institutions, particularly where tax evasion is concerned. In the United Kingdom apparently such evidence can be obtained. See Clinch v. England Revenue Commissioners, [1974] 1 Q.B.76; [1973] 2 W.L.R. 862; [1973] 1 All.E.R. 976; Williams v. Summerfield, [1972] 2 Q.B. 512; [1972] 3 W.L.R. 131; [1972] 2 All.E.R. 1334. Indeed, even the Swiss government, which is notorious for protecting the privacy of financial transactions, might provide under certain circumstances to the United States information concerning Swiss banks. See Note, 15 Harv.Int'l.L.J. 349, 359 (1974). Finally, at oral argument, appellant's attorney conceded that under Cayman law the director of banking in the Cayman Islands would be able to obtain information from Field concerning the bank's operations in investigations instituted by legal authority in the Cayman Islands. In short, Field seeks to prohibit a United States grand jury from obtaining information that would have been obtainable by officials there for their own investigations. Since the general rule appears to be that for domestic investigations such information would be obtainable, we find it difficult to understand how the bank's

customers' rights of privacy would be significantly infringed simply because the investigating body is a foreigh tribunal.

Finally, we reject Field's contention that what is involved here is only economic regulation. The collection of revenue is crucial to the financial integrity of the republic. In addition, the subject being investigated by this grand jury has received considerable attention and has been demonstrated to be a severe law enforcement problem. A report from the House Committee on Banking and Currency outlines the problems created and the type of activities investigated by the grand jury.

> Secret foreign bank accounts and secret foreign financial institutions have permitted a proliferation of 'white collar' crimes; have served as a financial under-pinning of organized criminal operation in the United States; have been utilized by Americans to evade income taxes, conceal assets illegally and purchase gold; have allowed Americans and others to avoid the law and regulations governing securities and exchanges; have served as an essential ingredient in frauds including schemes to defraud the United States; have served as an ultimate depository of black market proceeds from Vietnam; have served as a source of questionable financing for conglomerate and other corporate stock acquisitions mergers and takeovers; have covered conspiracy to steal from the U.S. defense and foreign aid funds; and have served as a cleansing agent for 'hot' or illegally obtained monies . . .

> The debilitating effects of the use of these secret institutions on Americans and the American economy are vast. It has been estimated that hundreds of millions in tax revenues have been lost. H.R.Rep. No. 91-975, 91 Cong. 2d Sess. 12 (1970).

If this court were to countenance Mr. Field's refusal to testify it would significantly restrict the ability of the grand jury to obtain information which might possibly uncover criminal activities of the most serious nature. In light of the traditional discretion given the grand jury and the significant interest this nation has in tax enforcement, without any specific direction from Congress, we see no reason not to enforce the subpoena.[6]

Field also contends that the procedure used in issuing this subpoena was unconstitutional as a deprivation of due process. This subpoena was issued pursuant to Rule 17, Fed.R.Cr.P. which provides that a subpoena shall be issued by the Clerk. Field's position is that he was entitled to a hearing before the subpoena could be issued since the requirement that he appear before the grand jury at a certain time and place was a deprivation of liberty. He relies solely on Fuentes v. Shevin, 407 U.S. 67 (1972).

In Fuentes the Supreme Court declared unconstitutional a procedure where the clerk of the court could issue a writ of replevin without any prior hearing. The Court

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[6]Since the Cayman bank Secrecy Act prohibits disclosure of any information concerning local banks nothing would be gained by limiting the scope of the grand jury questions. Even if such a limitation might alleviate Field's difficulty, this court would be reluctant to supervise the extent of the grand jury's attempt to obtain evidence. See Branzburg v. Hays, 408 U.S. 665, 701-705 (1972).

stated that the right to a prior hearing was normally required to protect "any significant property interest." 407 U.S. at 86. See also, Boddie v. Connecticut, 401 U.S. 371, 379 (1971). More recently the Court has pointed out that "whether any protections are due depends on the extent to which an individual will be condemned to suffer grievous loss." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). We believe that the requirement that Field appear before the grand jury is not a significant denial of liberty. It is certainly not a "grievous loss" of liberty. At a minimum, the state can require individuals to appear before government bodies at a reasonable time and place. Field, before being held in contempt, was given a hearing to contest the subpoena. There is no allegation that the subpoena was unreasonable or the government was harassing Mr. Field. See United States v. Dionisio, 410 U.S. 1, 9-12 (1973). Under Rule 17(g), one can be held in contempt only if he fails to appear "without adequate excuse." We find nothing which is repugnant to the Constitution in the procedure used to issue this subpoena.

Finally, Field argues that the court lacks power over a non-resident alien even though present in the United States. This contention is without merit as the Second Circuit stated in United States v. Germann, 370 F.2d 1019, 1022-23 (2d Cir. 1967).

> Of course there is no power to compel such a witness to come from abroad. But anyone within the jurisdiction of the court may be subpoenaed. . . . It makes no difference where he is resident or of what country he is a citizen.

We regret that our decision requires Mr. Field to violate the legal commands of the Cayman Islands, his country of residence. In a world where commercial transactions are international in scope, conflicts are inevitable. Courts and legislatures should take every reasonable precaution to avoid placing individuals in the situation Mr. Field finds himself. Yet, this court simply cannot acquiesce in the proposition that United States criminal investigations must be thwarted whenever there is conflict with the interest of other states.

We find Field's other contentions to be totally without merit. The judgment of the district court is

AFFIRMED.

APPENDIX B

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. CONSTITUTION

AMEND. [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

PART V—PROCEDURE

28 U.S.C. § 1826. Recalcitrant witnesses

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

Added Pub.L. 91—452, Title III, § 301(a), Oct. 15, 1970, 84 Stat. 932.

§ 1783. Subpoena of person in foreign country

(a) A court of the United States may order the issuance of a subpoena requiring the appearance as a witness before it, or before a person or body designated by it, of a national or resident of the United States who is in a foreign country, or requiring the production of a specified document or other thing by him, if the court finds that particular testimony or the production of the document or other thing by him is necessary in the interest of justice, and, in other than a criminal action or proceeding, if the court finds, in addition, that it is not possible to obtain his testimony in admissible form without his personal appearance or to obtain the production of the document or other thing in any other manner.

(b) The subpoena shall designate the time and place for the appearance or for the production of the document or other thing. Service of the subpoena and any order to show cause, rule, judgment, or decree authorized by this section or by section 1784 of this title shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena. As amended Oct. 3, 1964, Pub.L. 88-619, § 10(a), 78 Stat. 997.

94-64, § 5(29), 89 Stat. 575.

CAYMAN ISLANDS

LAW 8 of 1966
I assent,

(L.S.)

J. A. CUMBER
Administrator
28th May 1966

A LAW to regulate Banking Business and Trust Companies within the islands and other matters related thereto.

( )

Enacted by the Legislature of the Cayman Islands.

Short title and commencement

1. — This Law may be cited as the Banks and Trust Companies Regulation Law, 1966, and shall come into operation on a day to be appointed by the Administrator by Government Notice published in the Cayman Islands.

Interpretation

2. — In this Law unless the context otherwise requires —

"authorised agent" means a person designated by a bank or trust company under the provision of section 4;

"bank" means any person carrying on banking business;

"banking business" means the business of receiving on current, savings, deposit or other similar account money which is repayable by cheque or order and may be invested by way of advances to customers or otherwise;

"company" means a company incorporated either under the laws of the Islands or under the laws of any other country or place;

"licence" means a licence granted under section 4 of this Law or deemed to be so granted in accordance with that section;

"lincensee" means any person holding a licence under the provisions of this Law;

"person" includes any body of persons corporate or unincorporate;

"prescribed" means prescribed by regulations made under this Law;

"trust business" means the business of acting as trustee, executor or administrator;

"trust company" means any company carrying on trust business

Licence required to carry on banking business or to operate a trust company.

3. — (1) No banking business shall be transacted from within the Islands whether or not such business is carried on in the Islands except by a person who is in possession of a valid licence granted by the Administrator in Council authorizing him to carry on such business:

Provided that any bank in the Islands carrying on banking business at the commencement of this Law shall be deemed to have been granted a licence under section 4 of this Law for a period of six months from the commencement of this Law.

(2) No trust company shall carry on trust business from within the Islands whether or not such business is carried on in the Islands unless it is in possession of a valid licence granted by the Administrator in Council authorizing it to carry on such business:

Provided that any trust company in the Islands carrying on trust business at the commencement of this Law shall be deemed to have been granted a licence under section 4 of this Law for a period of six months from the commencement of this Law.

(3) Every person who contravenes the provisions of this section shall be guilty of an offence against this Law and shall be liable on summary conviction to a fine not exceeding one thousand pounds or to imprisonment for a term not exceeding one year or to both such fine and imprisonment and in the case of a continuing offence to a fine not exceeding one hundred pounds for each day during which the offence continues.

Application shall be made to the Administrator

4. — (1) Any person desirous of carrying on banking business and any company desirous of carrying on trust business from within the Islands shall make application to the Administrator for the grant of a licence. Every such application shall be in writing and shall contain such information and particulars and shall be accompanied by such references as may be prescribed and the Administrator in Council may, if satisfied that the carrying on of such business will not be against the public interest, grant a licence to such person or company subject to such terms and conditions, if any, as the Administrator in Council may deem necessary.

(2) Every bank and every trust company in the Islands at the commencement of this Law which proposes to carry on, or continue in, banking business or trust business, as the case may be, shall within six months of that

date apply to the Administrator for a licence in accordance with the provisions of subsection (1) of this section.

(3) Whenever it is considered to be in the public interest, the Administrator in Council may refuse to grant a licence.

(4) A licence shall not be granted to any bank or trust company having its head office or its registered office outside the Islands unless such bank or trust company designates and notifies to the Administrator —

(a) a principal office in the Islands;

(b) by name one of its officers who is to be the bank's or trust company's authorized agent in the Islands; and

(c) by name another of its officers who in the absence or inability to act of the officer named under paragraph (b) of this subsection is to be the bank's or trust company's authorized agent in the Islands.

(5) It shall be a condition of every licence granted to a bank or trust company to which subsection 4 of this section applies, that the bank or trust company shall forthwith notify the Administrator in writing of any change of —

(a) its principal office in the Island; or

(b) either or both of the officers designated pursuant to paragraph (b) or (c) of subsection (4).

(6) The Administrator in Council may by Order revoke any licence —

(a) if the licensee has ceased to carry on banking business or trust business; or

(b) if the licensee becomes bankrupt or goes into liquidation or is wound up or otherwise dissolved; or

(c) in the circumstances and in the manner provided for in section 9 of this Law.

Shares etc. not to be issued or transferred without approval of Administrator in Council.

5. — No shares in a company or certificates of deposit or any other securities of such company which is a licensee under this Law shall be issued and no issued shares shall be transferred or disposed of in any manner without the prior approval of the Administrator in Council:

Provided that —

(a) this section shall not apply to the several banks and trust companies specified in the Schedule hereto; and

(b) the Administrator in Council may exempt any other licensee from the provisions of this section subject to such terms and conditions, if any, as the Administrator in Council may deem necessary.

Use of the word "bank" etc.

6. — (1) Except with the approval of the Administrator in Council, no person, other than a licensee shall —

(a) use or continue to use the words "bank", "trust", "trust company", "trust corporation", "savings" or "savings and loan" or any of their derivatives either in English or in any other language, in the description or title under which such person is carrying on business from within the Islands whether or not such business is carried on in the Islands;

(b) make or continue to make any representation in any billhead, letter, letterhead, circular, paper, notice, advertisement or in any other manner whatsoever that such person is carrying on banking business or trust business;

(c) in any manner whatsoever solicit or receive deposits from the public.

(2) Except with the approval of the Administrator in Council, no company shall be registered or continue to be registered, by a name which contains the words "bank", "trust", "trust company", "trust corporation", "savings" or "savings and loan" or any of their derivatives either in English or in any other language, in the description or title under which such company is carrying on business from within the Islands whether or not such business is carried on in the Islands.

(3) Before giving his approval under subsection (1) or subsection (2) of this section the Administrator in Council may require of any person such references and such other information and particulars as may be prescribed.

(4) Whenever he considers it to be in the public interest the Administrator in Council may withdraw any approval given under subsection (1) of this section.

(5) The Administrator in Council may refuse to grant a licence to a bank or a trust company, or if such bank or trust company is already in possession of a licence, he may revoke such licence, if in his opinion such bank or trust company is carrying on or intending to carry on banking or trust business, as the case may be, under a name which —

(a) is identical with that of any company, firm or business house whether within the Islands or not or which so nearly resembles that name as to be calculated to deceive; or

(b) is calculated to suggest, falsely, the patronage of or connection with some person or authority whether within the Islands or not;

(c) is calculated to suggest, falsely, that such bank or trust company has a special status in relation to or derived from the Government of the Cayman Islands or has the official backing of or acts on behalf of the said Government or of any department or official thereof or is recognized in the Islands as a national or central bank or trust company.

(6) Every person who contravenes the provisions of this section shall be guilty of an offence against this Law and shall be liable on summary conviction to a fine not exceeding one thousand pounds or to a term of imprisonment not exceeding one year or to both such fine and imprisonment and in the case of a continuing offence to a fine not exceeding one hundred pounds for each day during which the offence continues.

Administrator In Council may require financial statement etc. of licensee.

7. — The Administrator in Council, in relation to a licensee which is or appears likely to become unable to meet its obligations or which in the opinion of the Administrator in Council is carrying on business in a manner detrimental to the public interest or to the interest of creditors or depositors of such licensee, may by instrument in writing require the manager or authorized agent of such licensee to supply within such reasonable time as may be specified in the instrument —

(a) the financial statement of that licensee as at a date within the previous fifteen months audited by an auditor who shall be a chartered accountant or a certified public accountant approved of by the Administrator; and

(b) such other information relating to the licensee as may be so specified;

and any person who contravenes the requirements of such an instrument or who in response to such an instrument knowingly or wilfully supplies false information to the

Administrator shall be guilty of an offence against the Law and shall be liable on summary conviction to a fine not exceeding five hundred pounds or to a term of imprisonment not exceeding six months or to both such fine and imprisonment.

Powers and duties of the Inspector

8. — (1) The Inspector of Banks and Trust Companies (hereinafter in this section referred to as "the Inspector") shall be a Government Officer appointed by the Administrator in Council.

(2) It shall be the duty of the Inspector —

(a) to maintain a general review of banking practice in the Islands;

(b) whenever he thinks fit or when required by the Administrator in Council to examine in such manner as he thinks necessary the affairs or business of every licensee carrying on business from within the Islands for the purpose of satisfying himself that the provisions of this Law are being complied with and that the licensee is in a sound financial position, and to report to the Administrator in Council the results of every such examination;

(c) to examine and report on the several returns delivered to the Administrator pursuant to Section 7 of this Law; and

(d) to examine and make recommendations to the Administrator in Council with respect to applications for licences.

(3) In the performance of his functions under this Law and subject to the provisions of section 10 hereof the Inspector shall be entitled at all reasonable times —

(a) to have access to such books, records, vouchers, documents, cash and securities of any licensee;

(b) to call upon the manager or any officer designated by the manager of any licensee for such information or explanation,

as the Inspector may reasonably require for the purpose of enabling him to perform his functions under this Law:

Provided always that the Inspector shall only have access to the account of a depositor of a licensee or to any information, matter or thing relating to or concerning the affairs of any customer of a licensee under the authority of an order of the Judge of the Grand Court made on the ground that there are no means of obtaining the information required by him.

(4) The Inspector with the approval of the Administrator in Council may in writing authorize any other person to assist the Inspector in the performance of his functions under this Law.

(5) Any person who fails to comply with any requirement made pursuant to subsection (3) by the Inspector or any person authorized under subsection (4) of this

section shall be guilty of an offence against this Law and shall be liable on summary conviction to a fine not exceeding five hundred pounds or to a term of imprisonment not exceeding six months or to both such fine and imprisonment.

Powers of the Administrator in Council.

9. — If in the opinion of the Administrator in Council a licensee is carrying on its business in a manner detrimental to the public interest or to the interests of its depositors or other creditors or is either in the Islands or elsewhere contravening the provisions of this or any other Law or of any Order or Regulations made under this Law, the Administrator in Council may from time to time as may to him seem necessary, require forthwith to take such steps as he may consider necessary that licensee to rectify the matter or may make an order revoking the licence of such licensee and requiring its business in the Islands to be wound up.

Preservation of secrecy.

10. — (1) Except for the purpose of the performance of his duties or the exercise of his functions under this Law or when lawfully required to do so by any court of competent jurisdiction within the Islands or under the provisions of any Law of the Islands, no person shall disclose any information relating to any application by any person under the provisions of this Law or to the affairs of a licensee or of any customer of a licensee which he has acquired in the performanee of his duties of the exercise of his functions under this Law.

(2) Every person who contravenes the provisions of subsection (1) of this section shall be guilty of an offence against this law and shall be liable on summary conviction to a fine not exceeding one thousand pounds or to a term of imprisonment not exceeding one year or to both such fine and imprisonment.

Administrator in Council may suspend licence.

11. — (1) Whenever the Administrator in Council is of the opinion that any action under section 4(6), section 6 or section 9 of this Law should be taken against a licensee, he may forthwith suspend the licence of such licensee and before taking such action the Administrator in Council shall give that licensee notice in writing of his intention so to do setting out in such notice the grounds on which he proposes to act and shall afford the licensee within such time as may be specified therein not being less than seven days an opportunity of submitting to him a written statement of objections to such action, and thereafter the Administrator in Council shall advise the licensee of the decision.

(2) Whenever the Administrator in Council shall suspend a licence under subsection (1) of this section he may cause notice of such suspension to be published in the Islands by Government Notice.

Power of search.

12. — (1) If a Justice of the Peace is satisfied by information on oath given by the Inspector or by a person authorized under section 8 (4) of this Law to assist the Inspector either —

(a) that a licence has been suspended; or

(b) that there is reasonable ground for suspecting that an offence against this Law has been or is being committed and that evidence of the commission of the offence is to be found at any premises specified in the information, or in any vehicle, vessel or aircraft so specified;

or

(c) that any books, records, vouchers, documents, cash or securities which ought to have been produced under section 8 (3) of this Law and have not been produced are to be found at any such premises or in any such vehicle, vessel or aircraft;

he may grant a search warrant authorizing the Inspector or such person authorized under section 8 (4) or any peace officer together with any other person named in the warrant and any other peace officers, to enter the premises specified in the information or, as the case may be, any premises upon which the vehicle, vessel or aircraft so specified may be, at any time within one month from the date of the warrant, and to search the premises or, as the case may be, the vehicle, vessel or aircraft.

(2) The person authorized by such warrant as aforesaid to search any premises or any vehicle, vessel or aircraft may search every person who is found in or whom he has reasonable ground to believe to have recently left or to be about to enter those premises or that vehicle, vessel or aircraft, as the case may be, and may seize any books, records, vouchers, documents, cash or securities found in the premises or in the vehicle, vessel or aircraft which he

has reasonable ground for believing to be evidence of the commission of any offence against this Law or any such books, records, vouchers, documents, cash or securities found in the premises or in the vehicle, vessel or aircraft which he has reasonable ground for believing ought to have been produced under section 8 (3) of this Law,

Provided that no female shall, in pursuance of any warrant issued under this subsection be searched except by a female.

(3) Where by virtue of this section a person has any power to enter any premises he may use such force as is reasonably necessary for the purpose of exercising that power.

(4) Every person who shall obstruct the Inspector or any other person in the exercise of any power conferred on him by virtue of this section shall be guilty of an offence against this Law and shall be liable on summary conviction to a fine not exceeding one hundred pounds or to imprisonment for a term not exceeding three months or to both such fine and imprisonment.

Regulations.

13. — The Administrator in Council may make regulations for all or any of the following purposes—

(a) to prescribe the information, particulars and references which may be prescribed under section 4(1) and section 6(3) of this Law;

(b) generally for carrying the purposes or provisions of this Law into effect.

Saving.

14. — (1) The provisions of this Law shall have effect in addition to and not in derogation of any other provisions having the force of law in the Islands.

(2) This Act shall not apply to the Post Office Savings Bank.

Appeal.

15. — (1) An appeal shall lie to the Grand Court from any decision of the Administrator in Council—

(a) revoking a licence under section 4(6), section 6(5) or section 9;

(b) withdrawing any approval under section 6(4); or

(c) requiring a licensee to take certain steps which the Administrator in Council may specify under section 9.

(2) An appeal against the decision of the Administrator in Council shall be on motion. The appellant within twenty-one days after the day on which the Administrator in Council has given its decision shall serve a notice in writing signed by the Appellant or his Counsel or Attorney on the Administrator of his intention to appeal and of the general ground of his appeal:

Provided that any person aggrieved by the decision of the Administrator in Council may upon notice to the Administrator apply to the Grand Court for leave to extend the time within which the notice of appeal prescribed by this section may be served, and the Grand Court upon the

hearing of such application may extend the time within which the notice of appeal prescribed by this section may be served, and the Grand Court upon the hearing of such application may extend the time prescribed by this section as it deems fit.

(3) The Administrator shall upon receiving the notice of appeal transmit to the Clerk of the Court without delay a copy of the decision and all papers relating to the appeal:

Provided that the Administrator in Council shall not be compelled to disclose any information if it is considered that the public interest would suffer by such disclosure.

(4) The Clerk of the Court shall set the appeal down for argument on such day, and shall cause notice of the same to be published in such manner, as the Grand Court may direct.

(5) At the hearing of the appeal the Appellant shall, before going into the case, state all the grounds of appeal on which he intends to rely and shall not, unless by leave of the Grand Court, go into any matters not raised by such statement.

(6) The Grand Court may adjourn the hearing of the appeal and may upon hearing thereof confirm, reverse, vary or modify the decision of the Administrator of Council or remit the matter with the opinion of the Grand Court thereon to the Administrator.

(7) An appeal against a decision of the Administrator in Council shall not have the effect of suspending the execution of such decision.

Section 5.

SCHEDULE

The Royal Bank of Canada
Canadian Imperial Bank of Commerce
The Bank of Nova Scotia
Bank of London & Montreal Limited
Barclays Bank D.C.O.
First National City Bank
The Chase Manhattan Bank
E.D. Sassoon Banking Company Limited
Butlers Bank Limited
The Bank of Nassau Limited
World Banking Corporation Limited
Trust Corporation of Bahamas Limited
Arawak Trust Company Limited
First National Trust Company (Bahamas) Limited
The Bank of Nova Scotia Trust Company (Bahamas) Limited
The Chase Manhattan Trust Corporation Limited
Bahamas International Trust Company Limited.

Passed by the Assembly this 14th day of March 1966.

J.A. CUMBER
President

HOPE D.E. GLIDDEN BORDEN
Acting Clerk of the Legislative Assembly

Government Notice No. 74 of 1966
Date of operation 7th July, 1966.

APPENDIX C

CASES IN CONFLICT

United States Court of Appeals
Second Circuit.

No. 154, Docket 27070.

Application of The CHASE MANHATTAN BANK, Petitioner-Appellee,

To Modify a Subpoena Duces Tecum Issued by the Clerk of the Southern District Upon the Request of the United States Attorney, Directing The Chase Manhattan Bank to Produce Before the United States Grand Jury of the Southern District Specified Records of The Chase Manhattan Bank.

United States of America, Respondent-Appellant.

Argued Dec. 12, 1961.

Decided Jan. 11, 1962.

Proceeding on a motion by New York bank to modify a subpoena duces tecum insofar as it directed production of records of a Panamanian branch bank. From an order of the United States District Court for the Southern District of New York, Archie Owen Dawson, J., 191 F.Supp. 206, modifying the subpoena, the government appealed. The Court of Appeals, Leonard P. Moore, Circuit Judge, held that where bank showed that compliance with subpoena duces tecum would violate Panamanian law, subpoena was properly modified so as to leave next move up to the government, but subpoena was properly left outstanding to insure that bank would comply with its duty of ac-

tively co-operating with government if the government asked Panamanian authorities to authorize the branch bank to produce the documents.

Affirmed.

Witnesses — 16

Where bank showed that compliance with subpoena duces tecum directing New York bank to produce, inter alia, records of Panamanian branch bank would violate Panamanian law, subpoena was properly modified so as to leave next move up to government but subpoena was properly left outstanding to insure that bank would comply with its duty of actively co-operating with government if government asked Panamanian authorities to authorize branch bank to produce the documents.

Peter H. Morrison, Asst. U.S. Atty., Southern Dist. of New York, New York City (Robert M. Morgenthau, U.S. Atty. for Southern Dist. of New York, New York City, on the brief; David Klingsberg, Asst. U.S. Atty., Southern Dist. of New York, New York City, of counsel), for respondent-appellant.

Samuel Ross Ballin, New York City (Milbank, Tweed, Hope & Hadley, New York City, on the brief; Andrew J. Connick, New York City, of counsel), for petitioner-appellee.

Before LUMBARD, Chief Judge, and MOORE and HAYS, Circuit Judges.

LEONARD P. MOORE, Circuit Judge.

This is an appeal by the Government from an order of the district court, the effect of which was to modify a grand jury subpoena duces tecum addressed to and directing appellee, The Chase Manhattan Bank (Chase), to produce, inter alia, records in the possession of a branch located in the Republic of Panama. The subpoena was served on Chase, a New York corporation, in New York, its principal place of business, on January 17, 1961. It required Chase to appear before the United States Grand Jury for the Southern District of New York on January 27, 1961, and produce certain banking records "wherever held" relating to the accounts of four individuals and one corporation.

On January 19, 1961, Chase, by its attorneys, advised the United States Attorney that on the return day of the subpoena, Chase would produce all relevant records in Chase's possession in New York, but that any relevant records in the possession of its Panamanian branches would not be produced unless Chase was assured by Panamanian counsel that production of such records would not violate Panamanian law. On the same day, Chase requested the Panamanian branch to obtain a legal opinion with respect to the production of pertinent records as soon as possible.

On January 27, 1961, counsel for Chase produced the New York records, but advised the Grand Jury that the legal opinion with respect to production of Panamanian records had not yet been received. An adjournment was requested, and the Grand Jury instructed Chase to produce the Panamanian records on January 30, 1961. Chase then telephoned the Panamanian branch and learned that it had just received a written legal opinion to the effect that production in New York of records in the possession of

the branch, without the consent of local authorities, would violate Panamanian law. On January 30, 1961, Chase by order to show cause why the subpoena should not be modified as to the Panamanian records, commenced the proceeding now before us on appeal. On the same day, the President of Panama signed Law No. 17, enacted by the Legislature on the previous day. A copy of this new law was submitted to the court on February 2, 1961, the return day of the order to show cause, and it is upon this law that the district court's opinion rests.

Article 89 of Law No. 17 provides in part:

> "The merchant furnishing a copy or reproductions of the contents of his books, correspondence and other documents for use in an action abroad, in compliance with an order of an authority not of the Republic of Panama, shall be penalized with a fine not greater than one hundred balboas (B/100.00)."

Article 93 of Law No. 17 provides:

> "The account books, correspondence and other documents which the merchant must keep shall be maintained in his establishment in order that they may be examined by the authority competent therefor. It is forbidden to remove them outside of the country. Violation of this prohibition shall be penalized with a fine not greater than one hundred balboas (B/100.00)."

In its original order on February 9, 1961, the lower court explicitly accepted the principle that a subpoena

duces tecum should be modified if compliance would necessitate a violation of foreign law. However, it denied the motion to modify the subpoena on the grounds that Chase had not adequately established that Law No. 17 would be interpreted to apply, commenting on the lack of any affidavits from Panamanian sources.

On February 15, 1961, Chase moved by an order to show cause for reargument of the application to modify and for a hearing at which to present the testimony of a Panamanian legal expert. The motion was granted and at a hearing on February 24, 1961, Chase produced Senor Carlos Icaza, its Panamanian counsel. He testified that in his opinion, Chase could not respond to the subpoena without subjecting itself to penalties under Panamanian law, and that American authorities could gain access to Panamanian records of American firms only by making application through the Panamanian courts. He also stated that Law No. 17 is the only Panamanian law containing any sanctions with respect to production of records in response to foreign process, and that a violation of the Panamanian law would be equivalent to a misdemeanor under our criminal law. The Government offered no evidence.

Following the rehearing, the district court ruled that Chase had sufficiently shown that production of these records would violate Panamanian law and held that under these circumstances "the next move is up to the Government." The subpoena was left outstanding to insure that Chase complied with its "duty of actively cooperating with the Government" if the Government asked the Panamanian authorities to authorize the Panama branch to produce the documents.

The result reached by the court below is in accord with our previous decision in First National City Bank v. Internal Revenue Service, 2 Cir., 1959, 271 F.2d 616, cert. denied, 361 U.S. 948, 80 S.Ct. 402, 4 L.Ed.2d 381 (1960). There we reinstated a subpoena duces tecum on the ground that there was no showing that the law of Panama would be violated by compliance. We stated (271 F.2d p. 619) that if in fact production of branch records located in Panama "would require action by personnel in Panama in violation of the constitution and laws of Panama * * * production * * * should not be ordered" by the courts of this country.

In the instant case, the Government argues that compliance will not violate Panamanian law, since the subpoena is not directed to personnel in Panama but only to the head office in New York. Upon the assumption that "authority" as used in Article 89 means government official (Senor Icaza so testified), the Government concludes that one not a government official (such as a bank official) could, consistently with Panamanian law, order the production of specified records and that the Panamanian branch could legally respond to a request by the Chase head office in New York. However, this would be nothing more than an attempt to circumvent the Panamanian law. Such a maneuver scarcely reflects the kind of respect which we should accord to the laws of a friendly foreign sovereign state. Just as we would expect and require branches of foreign banks to abide by our laws applicable to the conduct of their business in this country, so should we honor their laws affecting our bank branches which are permitted to do business in foreign countries.

The Government also argues that First National City Bank stands for the proposition that the foreign law prohibiting production must provide criminal sanctions to justify the court in modifying the subpoena. But we need not now decide whether the sanctions must always be criminal. The testimony before the district court was to the effect that violation of the Panama statute would be "equivalent to a misdemeanor" under our criminal law.

Finally, the Government contends that before the district court could modify the subpoena, Chase had to show a good faith effort to comply. However, Chase will still be required to demonstrate its good faith, since the court left the subpoena outstanding. This will insure Chase's cooperation with the Government when and if the Government seeks to obtain the records by application to the Panamanian authorities. On the facts of this case, there is nothing unreasonable about modifying the subpoena so as to leave the next move up to the Government.

The Government, as well as other litigants, has a real interest in civil and criminal cases in obtaining evidence wherever located. However, we also have an obligation to respect the laws of other sovereign states even though they may differ in economic and legal philosophy from our own. As we recently said in modifying subpoenas duces tecum in another case, "upon fundamental principles of international comity, our courts dedicated to the enforcement of our laws should not take such action as may cause a violation of the laws of a friendly neighbor or, at the least, an unnecessary circumvention of its procedures." Ings v. Ferguson, 2 Cir., 1960, 282 F.2d 149.

Affirmed.

United States Court of Appeals
Second Circuit.

Nos. 557, 558, Dockets 32404, 32405.

UNITED STATES of America,
Petitioner-Respondent,
v.

FIRST NATIONAL CITY BANK
and William T. Loveland,
Respondents-Appellants.

In the Matter of the Grand Jury Subpoena
Addressed to First National City Bank.

Argued June 12, 1968.

Decided June 26, 1968.

Proceeding on matter of grand jury subpoena duces tecum requiring New York bank to produce, as part of investigation of antitrust law violations by bank's customers, documents possessed by bank's foreign branch in Germany. The United States District Court for the Southern District of New York, Milton Pollack, J., adjudged the bank and a bank officer to be in civil contempt for failure to comply with the subpoena, 285 F.Supp. 845 and the bank and its officer appealed. The Court of Appeals, Kaufman, Circuit Judge, held that fact that bank's compliance with subpoena would subject bank to civil liability under German law was not justification for disobeying subpoena, and that citing American bank and bank officer

for civil contempt for noncompliance with subpoena requiring production of documents possessed by bank's foreign branch in Germany was proper.

Affirmed.

1. Federal Civil Procedure—1551

Federal court has power to require production of documents located in foreign countries if court has in personam jurisdiction of person in possession or control of the material.

2. International Law—10.11

State having jurisdiction to prescribe or enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under law of another state having jurisdiction with respect to that conduct.

3. Constitutional Law—68(1)

Courts must take care not to impinge upon prerogatives and responsibilities of political branches of government in the extremely sensitive and delicate area of foreign affairs.

4. Grand Jury—36

Fact that New York bank's compliance with grand jury subpoena duces tecum requiring, as part of investigation of alleged antitrust law violations by bank's customers, production of documents possessed by bank's foreign

branch in Germany would subject bank to civil liability under German law was not justification for disobeying subpoena, where neither United States nor German governments opposed production of the records, and bank appeared to have defenses as to the asserted civil liability.

5. Grand Jury—36

Citing American bank and bank officer for civil contempt for refusal to comply with grand jury subpoena duces tecum requiring, as part of investigation of alleged antitrust law violations by bank's customers, production of documents possessed by bank's foreign branch in Germany was proper, despite bank's contention that compliance would subject bank to civil liability under German law, where bank had failed to produce or segregate records reflecting bank's own work product which allegedly could be disclosed without liability, and one of customers involved was a New York corporation.

Henry Harfield, New York City (Shearman & Sterling, Michael J. Aratingi, New York City, of counsel), for respondents-appellants.

Carl W. Schwarz, Atty., Dept. of Justice, Washington, D.C., (Edwin M. Zimmerman, Acting Asst. Atty. Gen., Howard E. Shapiro, David S. J. Brown, Ernest S. Carsten, Attys., Dept. of Justice, of counsel), for petitioner-appellee.

Briefs of amicus curiae urging reversal were filed by Sullivan & Cromwell, New York City (William C. Pierce, New York City, of counsel), for The New York Clearing House Association, Bank of America National Trust and Savings Association, Brown Brothers Harriman & Co.,

The First National Bank of Boston, The First National Bank of Chicago; and Kelley, Drye, Newhall, Maginnes & Warren, New York City (Francis S. Bensel, Albert J. Walker, Richard J. Concannon, New York City, Brown & Platt, Chicago, Ill., of counsel), for Continental Illinois National Bank & Trust Co. of Chicago.

Before SMITH, KAUFMAN and HAYS, Circuit Judges.

KAUFMAN, Circuit Judge:

The issue presented on this appeal is of considerable importance to American banks with branches or offices in foreign jurisdictions. We are called upon to decide whether a domestic bank may refuse to comply with a valid Grand Jury subpoena duces tecum requiring the production of documents in the possession of a foreign branch of the bank on the ground that compliance would subject it to civil liability under the law of the foreign state.

The district judge's factual recitation, carefully set forth upon the conclusion of the hearing on contempt, makes it unnecessary for us to do more than sketch the facts briefly.

On March 7, 1968, First National City Bank of New York [Citibank] was served with a subpoena duces tecum in connection with a federal Grand Jury investigation of certain alleged violations of the antitrust laws by several of its customers.[1] The subpoena required the production of documents located in the bank's offices in New York City

[1]Citibank is organized under the laws of the United States and has its principal place of business in the Southern District of New York.

and Frankfurt, Germany, relating to any transaction in the name of (or for the benefit of) its customers C. F. Boehringer & Soehme, G.m.b.H., a German corporation, and Boehringer Mannheim Corporation, a New York corporation [referred to jointly hereinafter as "Boehringer"].[2] Citibank complied with the subpoena insofar as it called for the production of material located in New York but failed to produce or divulge any documents reposited in Frankfurt. Indeed, the bank even refused to inquire or determine whether any relevant papers were overseas. Instead, William T. Loveland, Citibank's vice-president responsible for the decision to defy the subpoena, appeared before the Grand Jury and asserted that the bank's action was justified because compliance would subject Citibank to civil liability and economic loss in Germany.

On May 8, 1968, Judge Pollack conducted an initial hearing at which the sole witness was Dr. Martin Domke, an expert in German law. He testified on behalf of Citibank that under the "bank secrecy law" of Germany, a bank—including a foreign bank (such as Citibank) licensed to do business in Germany—cannot divulge information relating to the affairs of its customers even in response to the process of a court of the United States. To do so, he claimed, would amount to a breach of the bank's "self evident" contractual obligation which flows from the business relationship between bank and customer. Domke

[2]Citibank does not contend that records located in its Frankfurt branch are not within the possession, custody and control of the head office. See United States v. First National City Bank, 379 U.S. 378, 384, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965); First National City Bank of New York v. Internal Revenue Service etc., 271 F.2d 616, 618-619 (2d Cir. 1959), cert. denied, 361 U.S. 948, 80 S.Ct. 402, 4 L.Ed.2d 381 (1960).

made it clear that bank secrecy was not part of the statutory law of Germany; rather, it was in the nature of a privilege that could be waived by the customer but not the bank. He insisted that a violation of bank secrecy could subject the bank to liability in contract or tort but not to criminal sanctions or their equivalent. But, he made it plain, that it was a simple matter for a bank customer to obtain an ex parte restraining order enjoining a bank from disclosing privileged material and that a violation of such an injunction would be punished under a general provision of the criminal law governing violations of court orders.[3] As a result of this testimony, the district judge appropriately decided to adjourn this hearing in order to afford an opportunity to Citibank to ascertain whether its customers would obtain such an injunction and which would have the effect of subjecting the bank to criminal penalties if it complied with the subpoena. This did not prove fruitful however, for the very next day, the court was advised by Citibank's counsel that Boehringer did not intend to take advantage of the readily available injunctive procedures under German law. Instead, the judge was told that Boehringer had informed Citibank that it would have to "suffer the consequences" if it obeyed the subpoena. It was suggested that Boehringer would sue the bank for

[3]Section 890 of the German Code of Civil Procedure provides that:

> "If the defendant violates his duty to omit an act or to suffer the commission of an act, the Court of first instance, on application of the plaintiff, must punish him, the defendant, for each violation with a fine or with jail up to six months. * * *"

Although this section is found in the Code of Civil Procedure the penalties it prescribes are considered criminal sanctions.

breach of contract and would also use its influence within German industrial circles to cause Citibank to suffer business losses.[4]

In any event, Citibank remained adamant in its refusal to produce the documents located in Frankfurt and on May 21, 1968, a second hearing was held, this time on the government's order to show cause why the bank and Loveland should not be held in civil contempt. Domke testified once again as did a government expert, Dr. Magdalena Schoch. Both witnesses discussed with great particularity the precise nature of German bank secrecy[5] and Citibank's prospective liability under German law if it were sued for disclosing privileged information. Domke made the point that compulsion by an American court would not be accepted as an excuse for violating bank secrecy and that in a civil suit under German law the court would determine "in its free discretion" the amount of damages, if any. Schoch insisted, however, that Citibank would have a number of valid defenses in the event Boehringer ever sued.[6]

[4]Dr. Domke testified that if he were representing Boehringer in Germany, he would advise his client not to seek an injunction enforceable under Section 890, see note 3, supra, until the court in the United States had decided whether to enforce the subpoena.

[5]In addition, an official of the German Consulate General in New York, introduced a statement from the Bundesbank—the central bank of Germany roughly equivalent to the Federal Reserve Bank—defining the German policy of bank secrecy. This statement was in broad terms, not addressed to the specific facts of the instant litigation, and did not add to or contradict the testimony of either expert witness in any significent way.

[6]Dr. Schoch testified that if Citibank were sued by Boehringer, the bank could plead compulsion by an American court as a complete defense to the action. She indicated that performance of the bank's contract with Boehringer would be excused under German doctrines of impossibility of performance and of requiring only the "good faith"

(Footnotes continued on next page.)

Moreover, Schoch's testimony made clear that in a criminal proceeding in Germany bank secrecy does not provide a basis for refusing to obey a court order to provide evidence.[7]

In a reasoned opinion, Judge Pollack concluded that Citibank had failed to present a legally sufficient reason for its failure to comply with the subpoena. He determined that it was manifest that Citibank would not be subject to criminal sanctions or their equivalent under German law, that it had not acted in good faith,[8] and that there

(Footnotes continued from preceeding page.)

performance of contracts taking into consideration ordinary usage. Similar defenses were said to apply if Citibank were sued in tort. Moreover, Dr. Schoch indicated that Section 25 of Citibank's written contract with Boehringer—which provides that "The bank is not liable for any losses caused by disturbances of its operations or by domestic or foreign acts of authorities at home or abroad"—would provide another defense to a civil suit since the process of an American court would be considered the act of a "foreign authority." Cf. First National City Bank v. Internal Revenue Service etc., supra, 271 F.2d at 619-620 of New York (Panamanian provision dealing with disclosure pursuant to the order of "a competent authority and by means of legal formalities" not limited to proceedings of Panamanian authority). She testified further that Boehringer would have to prove actual damages resulting from the disclosure but could not recover for "loss of face or mental upset." (And, we note that in any event, any disclosure by Citibank would be made to the Grand Jury whose proceedings are kept secret.) Finally, Schoch gave her opinion that Citibank would have an action for damages against Boehringer under German law if Boehringer made good its threat to cause Citibank to lose business.

[7]The subpoena duces tecum, requiring the actual production of documents or other matter, is a procedural device unknown to German law. Instead, a party or witness is apparently required to testify with respect to relevant information; he need not, however, produce actual records.

[8]Judge Pollack based his finding of lack of good faith on the fact that Citibank, as noted above, had failed to even make a simple inquiry into the nature or extent of the records available at the Frankfurt branch. In addition, the expert testimony was clear that the bank secrecy doctrine applied only to material entrusted to a bank within the

was only a "remote and speculative" possibility that it would not have a valid defense if it were sued for civil damages. Accordingly, he adjudged the bank and Loveland to be in civil contempt and fined the bank $2,000 per day for its failure to act; he sentenced Loveland to 60 days' imprisonment.[9] For the reasons stated below, we conclude that Judge Pollack's order was justified and affirm.

[1] The basic legal question confronting us is not a total stranger to this Court. With the growing interdependence of world trade and the increased mobility of persons and companies, the need arises not infrequently, whether related to civil or criminal proceedings, for the production of evidence located in foreign jurisdictions. It is no longer open to doubt that a federal court has the power to require the production of documents located in foreign countries if the court has in personam jurisdiction of the person in possession or control of the material. See, e g., First National City Bank of New York v. Internal Revenue Service etc., 271 F.2d 616 (2d Cir. 1959), cert. denied, 361 U.S. 948, 80 S.Ct. 402, 4 L.Ed.2d 381 (1960). Thus, the task before us, as Citibank concedes, is not one of defining power but of developing rules governing the proper exercise of power. The difficulty arises, of course,

framework of any confidential relationship of bank and customer but not to records that were the bank's own work product. Citibank failed to produce any documents reflecting its own work product that were within the terms of the subpoena or to indicate that none existed.

[9]By the terms of the District Court's order, Citibank and Loveland were cited for civil contempt, both penalties to cease upon compliance with the subpoena. Also, the punishment could not extend beyond the expiration of the life of the Grand Jury. See Loubriel v. United States, 9 F.2d 807 (2d Cir. 1926); United States v. Collins, 146 F. 553 (D.C.D.Or.1906). See also Howard v. United States, 182 F.2d 908, 914 (8th Cir. 1950), vacated as moot, 340 U.S. 898, 71 S.Ct. 278, 95 L.Ed. 651 (1950).

when the country in which the documents are located has its own rules and policies dealing with the production and disclosure of business information—a circumstance not uncommon. This problem is particularly acute where the documents are sought by an arm of a foreign government. The complexities of the world being what they are, it is not surprising to discover nations having diametrically opposed positions with respect to the disclosure of a wide range of information. It is not too difficult, therefore, to empathize with the party or witness subject to the jurisdiction of two sovereigns and confronted with conflicting commands. For an example of a comparable dilemma resulting from the application of the antitrust laws, see British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd., [1953] 1 Ch. 19. See also Note, Limitations on the Federal Judicial Power to Compel Acts Violating Foreign Law, 63 Colum.L.Rev. 1441 (1963); Note, Subpoena of Documents Located in Foreign Jurisdictions, 37 N.Y.U.L Rev. 295 (1962).

[2, 3] In any event, under the principles of international law, "A state having jurisdiction to prescribe or enforce a rule of law is not precluded from exercising its jurisdiction solely because such exercise requires a person to engage in conduct subjecting him to liability under the law of another state having jurisdiction with respect to that conduct." Restatement (2d), Foreign Relations Law of the United States, § 39(1) (1965) (emphasis supplied). It is not asking too much however, to expect that each nation should make an effort to minimize the potential conflict flowing from their joint concern with the prescribed behavior. Id. at § 39(2). Compare Report of Oral Argument, 25 U.S. L.W. 3141 (Nov. 13, 1956), Holophane Co. v. United States, 352 U.S. 903, 77 S.Ct. 144, 1 L.Ed.2d 114

(1956). Where, as here, the burden of resolution ultimately falls upon the federal courts, the difficulties are manifold because the courts must take care not to impinge upon the prerogatives and responsibilities of the political branches of the government in the extremely sensitive and delicate area of foreign affairs. See, e.g., Chicago & Southern Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948). Mechanical or overbroad rules of thumb are of little value; what is required is a careful balancing of the interests involved and a precise understanding of the facts and circumstances of the particular case.

[4] With these principles in mind, we turn to the specific issues presented by this appeal. Citibank concedes, as it must, that compliance with the subpoena does not require the violation of the criminal law of a foreign power, as in Societe Internationale etc. v. Rogers, 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) (discovery under the Federal Rules of Civil Procedure); Ings v. Ferguson, 282 F.2d 149, 152, 82 A.L.R.2d 1397 (2d Cir.1960), or risk the imposition of sanctions that are the substantial equivalent of criminal penalties, as in Application of Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1962), or even conflict with the public policy of a foreign state as expressed in legislation, compare Restatement, supra, § 39, Reporters' Notes at p. 113. Instead, all that remains, as we see it, is a possible prospective civil liability flowing from an implied contractual obligation between Citibank and its customers that, we are informed, is considered implicit in the bank's license to do business in Germany.

But, the government urges vigorously, that to be excused from compliance with an order of a federal court, a

witness, such as Citibank, must show that following compliance it will suffer criminal liability in the foreign country. We would be reluctant to hold, however, that the mere absence of criminal sanctions abroad necessarily mandates obedience to a subpoena. Such a rule would show scant respect for international comity; and, if this principle is valid, a court of one country should make an effort to minimize possible conflict between its orders and the law of a foreign state affected by its decision. Cf. Restatement, supra, § 39(2); Ings v. Ferguson, supra, 282 F.2d at 152. The vital national interests of a foreign nation, especially in matters relating to economic affairs, can be expressed in ways other than through the criminal law. For example, it could not be questioned that, insofar as a court of the United States is concerned, a statement or directive by the Bundesbank (the central bank of Germany) or some other organ of government, expresses the public policy of Germany and should be given appropriate weight. Equally important is the fact that a sharp dichotomy between criminal and civil penalties is an imprecise means of measuring the hardship for requiring compliance with a subpoena. In Application of Chase Manhattan Bank, supra, this Court affirmed the modification of a subpoena because strict obedience would have resulted in a violation of Panamanian law punishable by a fine of not more than 100 Balboas (equivalent to $100); we held that a violation was the equivalent of a misdemeanor under our criminal law. It would be a gross fiction to contend that if the Bundesbank were to revoke the license of Citibank for a violation of bank secrecy the impact would be less catastrophic than having to pay an insignificant fine because the revocation is theoretically not "equivalent to a misdemeanor" or criminal sanction. We are not required to decide whether penalties must be under the "criminal law"

to provide a legally sufficient reason for noncompliance with a subpoena; but, it would seem unreal to let all hang on whether the label "criminal" were attached to the sanction and to disregard all other factors. In any event, even were we to assume arguendo that in appropriate circumstances civil penalties or liabilities would suffice, we hold that Citibank has failed to provide an adequate justification for its disobedience of the subpoena.

In evaluating Citibank's contention that compliance should be excused because of the alleged conflict between the order of the court below and German law, we are aided materially by the rationale of the recent Restatement (2d), Foreign Relations Law of the United States, § 40 (1965):

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and

> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

In the instant case, the obvious, albeit troublesome, requirement for us is to balance the national interests of the United States and Germany and to give appropriate weight to the hardship, if any, Citibank will suffer.

The important interest of the United States in the enforcement of the subpoena warrants little discussion. The federal Grand Jury before which Citibank was summoned is conducting a criminal investigation of alleged violations of the antitrust laws. These laws have long been considered cornerstones of this nation's economic policies, have been vigorously enforced and the subject of frequent interpretation by our Supreme Court. We would have great reluctance, therefore, to countenance any device that would place relevant information beyond the reach of this duly impaneled Grand Jury or impede or delay its proceedings. Judge Learned Hand put the issue in perspective many years ago: "The suppression of truth is a grievous necessity at best, more especially where as here the inquiry concerns the public interest; it can be justified at all only where the opposing private interest is supreme." McMann v. S. E. C., 87 F.2d 377, 378, 109 A.L.R. 1445 (2d Cir. 1937), cert. denied, McMann v. Engle, 301 U.S. 684, 57 S.Ct. 785, 81 L.Ed. 1342 (1937).

We examine the importance of bank secrecy within the framework of German public policy with full recognition that it is often a subtle and difficult undertaking to determine the nature and scope of the law of a foreign jurisdiction. There is little merit, however, in Citibank's

suggestion that the mere existence of a bank secrecy doctrine requires us to accept on its face the bank's assertion that compliance with the subpoena would violate an important public policy of Germany. See First National City Bank of New York [appellant herein] v. Internal Revenue, Service etc., 271 F.2d 616, 619 (2d Cir.1959), cert. denied, 361 U.S. 948, 80 S.Ct. 402, 4 L.Ed.2d 381 (1960) (analyzing, and rejecting, Citibank's contention that enforcement of a federal court order would require a violation of the law of Panama). While we certainly do not intend to deprecate the importance of bank secrecy in the German scheme of things, neither can we blind ourselves to the doctrine's severe limitations as disclosed by the expert testimony. We have already made the assumption that the absence of criminal sanctions is not the whole answer to or finally determinative of the problem. But, it is surely of considerable significance that Germany considers bank secrecy simply a privilege that can be waived by the customer and is content to leave the matter of enforcement to the vagaries of private litigation. Indeed, bank secrecy is not even required by statute. See Restatement, supra, § 40, comment (c): "A state will be less likely to refrain from exercising its jurisdiction when the consequence of obedience to its order will be a civil liability abroad." See also Restatement, supra, § 39, Reporters' Notes at p. 113.

Moreover, Section 300 of the Criminal Code of Germany provides that:

> Anybody who without authority discloses the secrets of another, shall be punished by imprisonment for a term not to exceed six months or by a fine, if the secret was intrusted or became known to him in his capacity as a

(1) Physician, dentist, pharmacist [and similar professions]

(2) Attorneys, patent attorney, notary public, defense counsel, auditor, Certified Public Accountant, or tax consultant.

It is not of little significance that a German court has noted, "The fact that bank secrecy has not been included in the penal protection of Section 300 of the Criminal Code must lead to the conclusion that the legislature did not value the public interest in bank secrecy as highly as it did the duty of secrecy of doctors and attorneys," District Court of Frankfurt (1953). Further, Section 53 of the German Code of Criminal Procedure grants the right of refusal to testify to a number of persons, ranging from clergymen and mid-wives to publishers and printers; again, reference to bankers is conspicuously absent.[10] It would be anomalous if Citibank, deprived of any right to assert bank secrecy in a criminal investigation conducted in Germany, could—in the absence of statutes imposing greater limitations upon foreign governments, cf. First National City Bank of New York v. Internal Revenue Service etc., supra, 271 F.2d at 619-620—benefit from German bank secrecy in a criminal investigation in the United States.[11]

[10]The omission of bankers cannot be considered accidental. Bankers are apparently privileged to refuse testimony in a civil proceeding. See Article 383 of the German Code of Civil Procedure.

[11]While it may be true that the subpoena duces tecum is unknown to German law, see note 7, supra, the important point is that bank secrecy is no bar to as much disclosure as German law ever requires in a criminal proceeding; it should have no greater impact in a criminal proceeding in this country.

In addition, it is noteworthy that neither the Department of State nor the German Government has expressed any view on this case or indicated that, under the circumstances present here, enforcement of the subpoena would violate German public policy or embarrass German-American relations.[12] The Supreme Court commented on this aspect in other litigation involving Citibank: "[If] the litigation might in time be embarrassing to United States diplomacy, the District Court remains open to the Executive Branch, which, it must be remembered, is the moving party in the present proceeding." United States v. First National City Bank, 379 U.S. 378, 384-385, 85 S.Ct. 528, 532, 13 L.Ed.2d 365 (1965). We are full aware that when foreign governments, including Germany, have considered their vital national interests threatened, they have not hesitated to make known their objections to the enforcement of a subpoena to the issuing court. See, e.g., In re Grand Jury Investigation of the Shipping Industry, 186 F.Supp. 298, 318 (D.C.1960). So far as appears, both the United States and German governments have voiced no opposition to Citibank's production of the subpoenaed records.

We turn now to the nature and extent of the alleged hardships to which Citibank would be subjected if it complied with the subpoena. It advances two grounds on which it will suffer injury. First, it states that it will be subjected to economic reprisals by Boehringer and will lose foreign business that will harm it and the economic interests of the United States. It paints a dismal picture of foreign companies boycotting American banks for fear that their business records will be subject to the scrutiny

[12]The Consulate General of Germany did, however, introduce a document describing the nature of bank secrecy. See note 5, supra.

of our courts. A partial answer is that the protection of the foreign economic interests of the United States must be left to the appropriate departments of our government, especially since the government is the moving litigant in these proceedings. Cf. United States v. First National City Bank, supra. Moreover, and not without importance, is the fact that the alleged economic reprisals are of doubtful legal relevance in light of the Supreme Court's rejection of a similar argument in First National City Bank (Omar), see 379 U.S. at 402, 85 S.Ct. 528 (dissenting opinion of Justice Harlan), and this Court's decision in First National Bank of New York v. Internal Revenue Service, etc., supra, 271 F.2d at 619, n. 2; and the factual underpinning for this claim is quite feeble considering Citibank's overseas growth following the decision in First National City Bank (Omar), supra.[13]

Second, Citibank complains that it will be subjected to civil liability in a suit by Boehringer. The importance of the possible financial loss Citibank might suffer as a result of such a suit must be viewed in light of Loveland's statement that "[W]e were not concerned with this isolated case and what one individual might do. The importance [sic], I believe, is the effect that it would have on our operations all over the world * * *." We have already rejected the contention that Citibank's alleged loss of business abroad is a sound justification for disobedience of the subpoena. In any event, Judge Pollack concluded that risk of civil damages was slight and speculative, and we agree. The chance that Boehringer will suffer compensable dam-

[13]The government stated at oral argument, and Citibank does not contend otherwise, that the bank's overseas growth rate has increased in the years since the Supreme Court rejected its contention in First National City Bank (Omar), that the Court's decision would subject the bank to severe economic consequences overseas.

ages is quite remote and Citibank appears to have a number of valid defenses if it is sued, both under the terms of the contract and principles of German civil law.[14] In addition, as we have noted, German courts are given wide latitude in determining whether to award any damages even in the face of liability. In the unlikely event that Boehringer were to sue Citibank, we cannot believe that Boehringer's adamant refusal to apply for a readily available injunction will pass unnoticed by the Court.

[5] Finally, additional factors support our conclusion that the district judge was correct in citing Citibank and Loveland for civil contempt. As noted above, Citibank has failed to produce or segregate documents or records which reflect the bank's own work product. And, the expert testimony indicated that disclosure of such material would not violate any policy of bank secrecy.[15] Moreover, one of the companies being investigated by the Grand Jury —Boehringer Mannheim Corporation—is incorporated in New York. Whatever one may think of requiring disclosure of records of a German corporation reposited in a bank in Germany, surely an American corporation cannot insulate itself from a federal Grand Jury investigation by entering into a contract with an American bank abroad requiring bank secrecy. Compare Restatement, supra, § 40, Comment (c). If indeed Citibank might suffer civil liability under German law in such circumstances, it must confront the choice mentioned in First National City Bank of New York v. Internal Revenue Service etc., supra, 271 F.2d at 620—the need to "surrender to one soverign

[14]See note 6, supra.

[15]See note 8, supra.

or the other the privileges received therefrom" or, alternatively a willingness to accept the consequences.

Since the life of the Grand Jury is rapidly drawing to a close, we direct that the mandate issue forthwith but that it be stayed for a period of seven days from the date of the filing of this opinion to permit Citibank, if it so chooses, to apply to the Supreme Court or a Justice thereof for a further stay or other relief.

Affirmed.

United States Court of Appeals
Second Circuit.

No. 315, Docket 25528.

FIRST NATIONAL CITY BANK OF NEW YORK, Petitioner-Appellee,
v.

INTERNAL REVENUE SERVICE OF UNITED STATES TREASURY DEPARTMENT,
Respondent-Appellant.

Argued June 8, 1959.

Decided Nov. 10, 1959.

Proceeding on motion by bank to vacate or modify summons of the Internal Revenue Service served upon the movant in calling for production of certain records of a foreign branch bank. The summons was modified in the United States District Court, Edward Jordan Dimock, J., 166 F.Supp. 21, and the Service appeals. The United States Court of Appeals, Hincks, Circuit Judge, held that the bank's control over the subject records was sufficiently shown and that no showing was made that the Panamanian laws would prevent production.

Reversed and remanded with directions.

1. Internal Revenue — 1451

On application by the Internal Revenue Service for the production of corporate records, there is a presumption

that the corporation is in possession and control of its own books and records and clear proof of lack of possession and control is necessary to rebut the presumption and a national bank incorporated under United States laws is as subject to the rule as any other corporation. Federal Reserve Act, § 25, 12 U.S.C.A. § 604.

2. Internal Revenue — 1451

The "control" over its records upon which is founded the obligation of a corporation to produce them upon summons or subpoena duces tecum is not an esoteric concept, and any officer or agent who has the power to cause the branch records to be sent from a branch to the home office for any corporate purpose has sufficient "control" to cause them to be sent on when desired for a governmental purpose properly implemented by subpoena under the Internal Revenue Code, 26 U.S.C.A. (I.R.C.1954) § 7602.

See publication Words and Phrases, for other judicial constructions and definitions of "Control."

3. Banks and Banking — 235

The statute respecting the accounts of foreign branches of national banking association and the entry of profit and loss is nothing more than a "bookkeeping" statute designed to make examination into financial condition of national banks, particularly the foreign operations of such banks, as simple as possible, and does not show an intent to insulate the records of foreign branches of such banks from official scrutiny but establishes that such branches shall report to the comptroller of the currency and shall be subject to examination by the Federal Reserve Board; In re Harris, 27 F.Supp. 480 overruled.

Federal Reserve Act, § 25, 12 U.S.C.A. §§ 601-604; 26 U.S.C.A. (I.R.C.195b) §§ 7602-7605.

4. Internal Revenue — 1451

A national bank was not entitled to defeat a summons to produce certain records of its foreign branch of bank in Panama on the ground that it would require action by Panama personnel in violation of the Constitution and laws of Panama where the bank failed to make a sufficient showing that such would result. 26 U.S.C.A. (I.R.C. 1954) §§ 7602-7605; Federal Reserve Act, § 25, 12 U.S.C.A. §§ 601-604.

5. Internal Revenue — 1451

A national bank with branch in Panama was not entitled to defeat a summons of Internal Revenue Service going for production of certain records of foreign branch on ground that subpoena would involve a violation of Panamanian statutory law banning any general examination of the bookkeeping in the offices of merchants, since the licensing of the national bank was some ground for inference that the Panamanian prohibitions did not extend to examination by and disclosures to duly authorized officers of the United States Government. Federal Reserve Act, § 25, 12 U.S.C.A. §§ 601-604; 26 U.S.C.A. (I.R.C. 1954) § 7604.

Robert J. Ward, Asst. U. S. Atty., for Southern Dist. of New York, New York City (Arthur H. Christy, U. S. Atty., S.D.N.Y., New York City, on the brief), for respondent-appellant.

John A. Wilson, New York City (Shearman & Sterling & Wright, Michael J. DeSantis, and MacIlburne Van Voorhies, New York City, on the brief), for petitioner-appellee.

Before HINCKS and LUMBARD, Circuit Judges, and SMITH, District Judge.

HINCKS, Circuit Judge.

In this proceeding the First National City Bank of New York (hereinafter called the "Bank") applied to the District Court to vacate or modify a summons to appear, testify, and produce books served on it by the Internal Revenue Service (hereinafter referred to as the "Service") under 26 U.S.C. § 7602. The summons called for the production before the Service in New York City of certain bank records relating to the account of Atlanta Corp. Ltd. (hereinafter called "Atlanta"), a Panamanian corporation with offices in New York City and Panama Republic of Panama, whose tax liability was under investigation. Certain records in the Bank's New York City files were produced, but the Bank declined to produce other records, contending that they were physically located at its branch bank in the Republic of Panama, and hence beyond the reach of the subpoena. Nonproduction was justified, said the Bank, first, because the records were not in its possession, custody, or control; second, because the production of such records without Atlanta's consent or an order of a Panama court would violate sound national banking practice; and third, because such production would also violate the constitution and laws of the Republic of Panama and established principles of international comity.

The District Court, relying on In re Harris, D.C.S.D. N.Y., 27 F.Supp. 480, modified the summons so as to require the production of local records only. D.C., 166 F.Supp. 21. On this appeal the Service argues that the Harris case was erroneously decided; that the Bank's control over the subject records has been sufficiently shown; that no showing has been made that either the constitution or the laws of Panama or international comity prevent production; and that compliance with the summons should be ordered upon reversal of the decision below. These contentions we sustain.

[1] It has long been held that there is a presumption that a corporation is in the possession and control of its own books and records. In re Ironclad Mfg. Co., 2 Cir., 201 F. 66. Clear proof of lack of possession and control is necessary to rebut the presumption. A national bank, incorporated under the laws of the United States would seem to be just as subject to the stated rule as any other corporation, unless there is something in the federal law regulating the conduct of such banks which either negatives the existence of any such presumption or rebuts it. The Bank insists that the presumption of control is negatived by 12 U.S.C.A. § 604, which we set forth in the margin.[1]

[2] The "control" over its records upon which is founded the obligation of a corporation to produce them

[1] U.S.C.A., Vol. 12, § 604, reads as follows:

"§604. Accounts of foreign branches; profit and loss

"Every national banking association operating foreign branches shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item."

upon summons or subpoena duces tecum is not an esoteric concept. Any officer or agent of the corporation who has power to cause the branch records to be sent from a branch to the home office for any corporate purpose, surely has sufficent control to cause them to be sent on when desired for a government purpose properly implemented by a subpoena under 26 U.S.C. § 7602. In this case, the District Court recognized the existence of actual, practical control by the Bank over its Panamanian branch records and we think that finding was right. In re Rivera, D.C.S.D.N.Y., 79 F.Supp. 510; Hopson v. United States, 2 Cir., 79 F.2d 302. See also S. E. C. v. Minas De Artemisa, S.A., 9 Cir., 150 F.2d 215.

[3] The Bank's contention that the effect of 12 U.S.C.A. § 604, especially as interpreted In re Harris, supra, was to deprive it of sufficient control over records in Panama to be subject to the subpoena, was accepted by the court below. This ruling, however, we think was erroneous. Section 604, in terms and in intent, does not support the Bank's conclusion. As argued by the Service, § 604 is nothing more than a "bookkeeping" statute, designed to make examination into the financial condition of national banks, particularly the foreign operations of such banks, as simple as possible. Reduced to its simplest terms, it is an instruction to the national banks operating foreign branches to keep separate accounts for each such branch, and not to lump the accounts together or to include them in the accounts of the home office.

Moreover, § 605 with the companion Sections 601 to 603, of Title 12, all stem from Section 25 of the Federal Reserve Act of 1913, 38 Stat. 271, which under the caption of "Foreign Branches" shows not an intent to insulate the

records of foreign branches from official scrutiny but, on the contrary, unmistakable intent that the branches shall report to the Comptroller of the Currency and shall at all times be subject to examination by the Federal Reserve Board. Indeed, Report 69, House of Representatives, 63rd Congress, 1st Session, accompanying H. R. 7837 which became the Federal Reserve Act of 1913, stated as the legislative objective that branch banks "shall be closely controlled by home institutions" even though the branches should conduct "their affairs separate from those of the home office in order that there may be no difficulty in ascertaining at any moment the distribution of the business of the institution."

It is true that relying in part on § 604 courts have held that in various commercial transactions between a branch bank and its home office the rights involved are to be determined as though the branch was acting at arm's length as an independent entity. See Pan-American Bank & Trust Co. v. National City Bank, 2 Cir., 6 F.2d 762, certiorari denied 269 U.S. 554, 46 S.Ct. 18, 70 L.Ed. 408. But from such doctrine it does not follow that in other situations not involving an arm's length relationship the manager of a foreign branch any more than the manager of a domestic branch or, indeed, an officer of the home office, is beyond the control of the Board of Directors who appointed him. To the extent that In re Harris is in conflict with this conclusion it is overruled.

[4] Finally,[2] the Bank argues that production of the

[2]The contention that power to enforce the subpoena would conflict with sound banking policy we think so lacking in substance as to deserve no discussion.

branch's records located in Panama would require action by personnel in Panama in violation of the constitution and laws of Panama. If such were the fact we should agree that the production of the Panama records should not be ordered. S.E.C. v. Minas De Artemisa, supra. However, the only evidence of that fact was contained in the affidavit of the Bank's expert in Panamanian law which in our view constituted insufficient basis for nonenforcement of the subpoena. His conclusion of constitutional violation was based on Article 29 of the Constitution which provided that "Correspondence and other private documents are inviolable and may not be seized or examined except by provision of a competent authority and by means of legal formalities. * * *" Assuming that this provision affords privilege against disclosure in favor of those whose affairs are the subject-matter of the disclosure, such as Atlanta, there is no showing that the Bank may invoke Atlanta's constitutional privilege as it seeks to do. Assuming, on the other hand, that this provision affords a privilege against disclosure to bystanders, such as the Bank, who have information relating to the affairs of others, there is no showing that criminal sanctions will attach if the Bank waives its privilege either voluntarily or at the command of its sovereign. Moreover, this is a case apparently falling within the stated exception—a subpoena issued by an officer of the United States Treasury Department under the control of a United States court and subject to all the "legal formalities" and safeguards of 26 U.S.C. §§ 7602-7605. The Constitution did not specify that the prohibition extended to the sovereign, either Panama or a foreign sovereign, or that the exception was limited to a Panamanian authority or Panamanian legal formalities. Nor was there evidence that such was its effect.

[5] The contention that compliance with the subpoena would involve a violation of Panamanian statutory law was based largely[3] on Articles 88 and 89 of the Panamanian Code of Commerce which banned "any general * * * examination of the bookkeeping in the offices * * * of the merchants." When the Republic of Panama granted its license for the Panama branch it must have known that the Bank was created under, and subject to, § 25 of the Federal Reserve Act of 1913, 38 Stat. 273, whereby it was required to furnish information concerning the condition of the branch to the Comptroller of the Currency of the United States and to submit to examination on order of the Governors of the Federal Reserve System. Thus the very fact that the Republic of Panama licensed an American bank, which was subject to this provision of American law, to carry on a branch in Panama is some ground for inference that the prohibitions of the Panamanian Constitution and statute on which the Bank relies did not extend to examinations by, and disclosures to, duly authorized officers of the United States government. If the Bank cannot, as it were, serve two masters and comply with the lawful requirements both of the United States and of Panama, perhaps it should surrender to one sovereign or the other the privileges received therefrom. We hold now, however, only that the ex parte proofs submitted by the Bank were insufficient to excuse compliance.

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[3]The Bank's expert also points to the disclosure provisions of the Panamanian Code of Civil Procedure. But certainly these procedural provisions do not control disclosure pursuant to a subpoena of the United States pursuant to federal statute. Moreover, voluntarily disclosure, not obtained through pursuance of these procedural provisions, has not been shown to be the subject-matter of any criminal sanction.

We reverse and remand with a direction to reinstate the subpoena as it originally issued and in the event of noncompliance to explore in contempt proceedings under 26 U.S.C. § 7604 the ability of the Bank to comply without subjecting its personnel to criminal sanctions under Panamanian law.

Ordered accordingly.